

EXHIBIT 104

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1

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF MASSACHUSETTS
3 BOSTON DIVISION

4 -----x

5 STUDENTS FOR FAIR ADMISSIONS,
6 INC.,

7 Plaintiff,

8 vs.

Civil Action No.
1:14-cv-14176

9 PRESIDENT AND FELLOWS OF HARVARD
10 COLLEGE (HARVARD CORPORATION);
11 and THE HONORABLE AND REVEREND
12 THE BOARD OF OVERSEERS,

13 Defendants.

14 -----x

15 - HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY -

16 DEPOSITION OF RAKESH KHURANA, a
17 witness called by the Plaintiff, taken
18 pursuant to the applicable provisions of
19 the Federal Rules of Civil Procedure,
20 before James A. Scally, RMR, CRR, a
21 Notary Public in and for the Commonwealth
22 of Massachusetts, at the offices of
23 WilmerHale, 60 State Street, Boston,
24 Massachusetts, on Thursday, April 27,
2017, commencing at 9:06 a.m.

Rakesh Khurana - April 27, 2017
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63

1 A. That's an empirical question.

2 Q. Okay. But my question is: What is your
3 answer to it?

4 MS. ELLSWORTH: Objection.

5 A. I believe that one's race or ethnicity can
6 impact their experience of others and themselves.

7 Q. But my question is: Do you think that's
8 always true?

9 MS. ELLSWORTH: Objection.

10 A. I think one's race or ethnicity can influence
11 one's experience.

12 Q. So do I understand your answer to be that
13 it -- it doesn't -- it doesn't always necessarily
14 influence one's experience?

15 MS. ELLSWORTH: Objection.

16 A. As a social scientist, I do -- would hesitate
17 to say always.

18 Q. Do you think that Harvard can -- do you think
19 Harvard can expose its students to a diversity of
20 perspectives and ideas without explicitly considering
21 a person's race or ethnicity in the admissions
22 process?

23 MS. ELLSWORTH: Objection.

24 A. I believe in order to accomplish our mission,

1 our students need to be exposed to a diversity of
2 perspectives and experiences of their peers.

3 Q. Understood. But my question is: Do you
4 think the explicit consideration of race or ethnicity
5 is the only way to expose them to that diversity of
6 perspectives and experiences?

7 MS. ELLSWORTH: Objection.

8 A. I believe exposure to different races and
9 ethnicities is an important way to expose students to
10 differences of perspectives and experiences.

11 Q. But my question is: Is the only way to
12 expose them to those experiences is by explicitly
13 considering race as one of the reasons as to why you
14 do or do not get into college at Harvard?

15 MS. ELLSWORTH: Objection.

16 A. I believe that race and ethnicity can be
17 considered among many other factors as part of how
18 students can be exposed to differences in ideas and
19 perspectives.

20 Q. Yes. But my question is: Do you think the
21 explicit consideration of race is the only way to
22 achieve that diversity of experiences?

23 MS. ELLSWORTH: Objection.

24 A. As a social scientist, I do believe that

1 considerations of race and ethnicity is one of the --
2 is an important way at this time to expose students
3 to different perspectives and points of view.

4 Q. My question is: Is it impossible to expose
5 them to the perspectives and points of view that you
6 think is necessary for the Harvard student body
7 without explicitly considering race?

8 MS. ELLSWORTH: Objection.

9 A. I believe that at this time it is important
10 to consider the backgrounds and experiences,
11 including race, as part of our holistic admissions
12 process to inform the level of exposure of diversity
13 and perspectives that our students would be exposed
14 to.

15 Q. I understand you think it's important. My
16 question is: Do you think it's the only way to get a
17 diversity of experiences?

18 MS. ELLSWORTH: Objection. Asked
19 and answered.

20 A. I don't know.

21 Q. You don't know?

22 Have you considered, for example, whether or
23 not you would get a sufficient diversity if Harvard
24 just used socioeconomic status instead of race?

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66

1 MS. ELLSWORTH: Objection.

2 A. I believe that considering a variety of
3 different backgrounds and experiences of our
4 students, including socioeconomic background, is an
5 important part of informing our holistic admissions
6 process that allows students to be exposed to
7 different perspectives and points of view.

8 Q. But you don't know whether if Harvard didn't
9 use race it would -- it would still have the
10 sufficient diversity of experiences and perspectives
11 or not?

12 MS. ELLSWORTH: Objection.

13 A. I don't believe that the consideration of
14 only socioeconomic background would produce a
15 sufficient diversity of perspectives and points of
16 view that we desire for accomplishing our Harvard
17 College mission.

18 Q. And why don't you believe that?

19 A. Diversity and perspectives and points of view
20 are informed by multiple characteristics.

21 Q. Do you know, for example, what -- what level
22 of racial diversity would be achieved if Harvard went
23 to a race-blind admissions process?

24 MS. ELLSWORTH: Objection.

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67

1 A. I would need to know what characteristics we
2 would be admitting students by.

3 Q. I'm just saying what if your admissions
4 process worked exactly the way it works now, it's
5 just that the student's ethnicity or race wasn't
6 available to the admissions office. Do you have any
7 idea what the resulting racial diversity of the class
8 would be?

9 MS. ELLSWORTH: Objection.

10 A. I believe that would not be a -- that would
11 not produce the kind of diversity that we desire in
12 our student body in order to expose them to different
13 perspectives and points of view. So it would not be
14 the right student body.

15 Q. And why do you believe that? Have you looked
16 at an alternative scenario?

17 A. I believe that a variety of backgrounds and
18 experiences cutting across a variety of different
19 dimensions, including race and ethnicity, are
20 important to consider in order to produce the diverse
21 student backgrounds for the type of educational
22 philosophy and mission Harvard College has.

23 Q. Have you personally looked at or reviewed
24 any -- any outcomes under an alternative admissions

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68

1 approach?

2 MS. ELLSWORTH: Objection.

3 I'll just remind the witness to
4 answer the question only to the extent
5 you can do so without disclosing advice
6 of counsel or communications with
7 counsel. If you can answer the
8 question without doing so, you may.

9 A. I have -- am taking the advice of counsel and
10 not answering that question.

11 Q. So other than in conversations with counsel,
12 you have never analyzed the level of racial diversity
13 that could be achieved if Harvard went to a race-
14 blind admissions process?

15 MS. ELLSWORTH: Objection.

16 A. I have not personally analyzed what could be
17 accomplished in the level of diversity depending on a
18 variety of different scenarios. I have not analyzed
19 that data.

20 Q. Do you -- and other than in conversations
21 with counsel, have you -- have you discussed the
22 diversity that would result from a race-blind
23 admissions process at Harvard?

24 A. Can you be more precise?

1 for the contents of communications with
2 counsel or advice of counsel, do not
3 disclose that information. But if you
4 can otherwise answer, you may go ahead.

5 A. In an educational setting, a diversity of
6 backgrounds and experiences helps inform different
7 perspectives and points of view that allow for more
8 thoughtful, richer discussions that advance knowledge
9 and understanding of a variety of different fields
10 which prepares our students for our ultimate goal of
11 having citizens and citizen leaders who contribute to
12 society.

13 Q. Outside the context of education, the use of
14 race in American society has not always been
15 positive; correct?

16 MS. ELLSWORTH: Objection.

17 A. It depends.

18 Q. Can you think of examples in which race was
19 used to a negative end in American history?

20 MS. ELLSWORTH: Objection.

21 A. Yes.

22 Q. And what are some of those examples?

23 MS. ELLSWORTH: Objection.

24 A. Slavery is one example.

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86

1 Q. Slavery is one example. Have you heard of
2 the Chinese Exclusion Act?

3 A. Yes.

4 Q. Have you heard of other -- are you familiar
5 with other examples of legal restrictions placed upon
6 people because of the color of their skin?

7 A. Yes.

8 Q. You would agree with me that none of those
9 were benign uses of race?

10 MS. ELLSWORTH: Objection.

11 Q. Correct?

12 THE WITNESS: Could you repeat the
13 prior question to this one that led to
14 this question.

15 (Question read.)

16 A. Yes.

17 Q. And you would agree that none of the examples
18 we just recounted, slavery, the Chinese Exclusion
19 Act, other legal restrictions that prohibited what
20 people could do on the color of their skin, none of
21 those were positive uses of race?

22 MS. ELLSWORTH: Objection.

23 A. I would agree with that characterization.

24 Q. And do you think it is possible that

Rakesh Khurana - April 27, 2017
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91

1 A. As one of many other things I would want to
2 see.

3 Q. What are the other things?

4 MS. ELLSWORTH: Objection.

5 A. One other thing would be a public education
6 system that was more equitably funded.

7 Q. What else?

8 A. Nonsegregated residential areas.

9 Q. If Harvard could achieve the level of racial
10 diversity in its student body that it has today
11 without using race as an explicit factor in the
12 admissions process, would you support its ceasing the
13 use of race?

14 MS. ELLSWORTH: Objection.

15 A. I don't know how it would do that.

16 Q. If it could, just hypothetical question, if
17 you could achieve the exact same breakdown of student
18 body by ethnicity as Harvard reports it to the
19 federal government today without using race in the
20 admissions process, would you support Harvard doing
21 that?

22 MS. ELLSWORTH: Objection.

23 A. I would need to understand how that was
24 achieved.

1 Q. And what would you need to understand?

2 A. What are the other kinds of characteristics
3 and backgrounds and experiences of the students
4 within each of those backgrounds and experiences.

5 Q. What if it produced a student body that was
6 identical to the student body today, so the exact
7 same admitted class came in without using race?
8 Would you support the abandonment of the use of race
9 at that point in the admissions process?

10 MS. ELLSWORTH: Objection.

11 A. I would not.

12 Q. Why not?

13 A. I think we still have more work to do to
14 ensure that we have as diverse a student body of
15 experiences, backgrounds, and lived experiences, and
16 I don't -- I'm not satisfied with where we are.

17 Q. And those conditions we were talking about
18 earlier, better education funding, higher social
19 mobility, less residential segregation, those would
20 all be necessary preconditions before you would
21 consider stopping the support for the use of race in
22 the admissions process?

23 MS. ELLSWORTH: Objection.

24 A. Those would be some but not exhaustive of all

Rakesh Khurana - April 27, 2017
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163

1 are, but I have the right to instruct
2 my witness. So just wait a minute,
3 please. (Pause.)

4 Can you read the question back,
5 please.

6 And then you can answer.

7 (Question read.)

8 THE WITNESS: I'm sorry. I didn't
9 track the whole question.

10 BY MR. STRAWBRIDGE:

11 Q. All the -- is it your testimony that any
12 conversations that your committee had or any work
13 that it did in exploring alternatives that would
14 preclude the consideration of an applicant's race in
15 the admissions process either involved or reflected
16 communications or advice of counsel? Is that your
17 testimony?

18 A. Yes.

19 Q. Okay. The report that -- did the Committee
20 to Study the Importance of Student Body Diversity
21 issue a report?

22 A. Which committee are you referring to?

23 Q. The Committee to Study the Importance of
24 Student Body Diversity, the one at Harvard College

Rakesh Khurana - April 27, 2017
Highly Confidential - For Attorneys' Eyes Only

164

1 that you testified you were involved in.

2 A. Yes.

3 Q. When did it issue that report?

4 A. In the fall of 2016, I believe. Excuse me.
5 2015.

6 Q. Do you know when the -- when the report
7 was -- or when that committee was first formed?

8 A. Yes.

9 Q. When?

10 A. I believe it was in the spring of 2015.

11 Q. In the spring of 2015.

12 Are you aware of any analysis done by anyone
13 at Harvard College prior to that date on the
14 educational benefits of diversity at Harvard College?

15 A. Yes.

16 Q. And what analysis are you aware of?

17 MS. ELLSWORTH: Just remind the
18 witness not to disclose communications
19 with counsel in answering the question.

20 A. Other writings on the subject.

21 Q. Are those writings that were relied upon and
22 cited in the report that your committee issued?

23 A. I believe they are.

24 Q. Okay. Are you aware of any other like

Rakesh Khurana - April 27, 2017
Highly Confidential - For Attorneys' Eyes Only

166

1 aware of any reports or studies undertaken by Harvard
2 that discussed the alternatives to the admissions
3 process that would not involve the use of race to
4 achieve diversity?

5 MS. ELLSWORTH: I'll just remind
6 the witness to answer the question only
7 to the extent you can do so without
8 disclosing advice of counsel or
9 communications of counsel.

10 A. I can't answer that question.

11 Q. Without referring to the advice of counsel?

12 A. Yes.

13 Q. So other than documents reflecting or reports
14 reflecting or containing the advice or communications
15 with counsel, can you identify any other report
16 Harvard College undertook prior to the work of your
17 committee or the Ryan committee analyzing whether or
18 not Harvard could achieve its diversity interests
19 without using race in the admissions process?

20 A. I don't think so.

21 (Recess: 2:07 p.m. to 2:14 p.m.)

22 ([Exhibit 5](#), report Bates stamped

23 HARV00008048 through 8069, marked.)

24 BY MR. STRAWBRIDGE:

Rakesh Khurana - April 27, 2017
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167

1 Q. I'm going to hand you what's been marked as
2 Exhibit 5. Do you recognize that document? (Pause.)

3 Do you recognize this document?

4 A. Yes.

5 Q. And what is this document?

6 A. It's the report of the Committee to Study the
7 Importance of Student Body Diversity.

8 Q. And this is the committee that you were a
9 member of?

10 A. Yes.

11 Q. I'll apologize for the cough. It's going to
12 haunt us the rest of the day. If there was something
13 I could do about it, I would have.

14 You were the chair of this committee; is that
15 correct?

16 A. Yes.

17 Q. Okay. Did you have any role in selecting the
18 members of the committee?

19 A. Yes.

20 Q. Okay. And what -- what was that role?

21 A. Considering and suggesting, contemplating and
22 thinking of different people to be on the committee.

23 Q. Did anyone else choose the members of the
24 committee, or was it left to your discretion?

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267

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

I, JAMES A. SCALLY, RMR, CRR, a Certified Shorthand Reporter and Notary Public duly commissioned and qualified in and for the Commonwealth of Massachusetts, do hereby certify that there came before me on the 27th day of April, 2017, at 9:06 a.m., the person hereinbefore named, RAKESH KHURANA, who provided satisfactory evidence of identification as prescribed by Executive Order 455 (03-13) issued by the Governor of the Commonwealth of Massachusetts, was by me duly sworn to testify to the truth and nothing but the truth of his knowledge concerning the matters in controversy in this cause; that he was thereupon examined upon his oath, and his examination reduced to typewriting under my direction; and that this is a true record of the testimony given by the witness to the best of my ability.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

My Commission Expires: April 8, 2022

James A. Scally, RMR, CRR
CSR/Notary Public